IN THE HIGH COURT OF PUNJAB AND HARYANA AT

CHANDIGARH

CWP No. 19065 of 2006

Date of Decision : 09.01.2007

National Building Construction Corporation Ltd. and another

…Petitioners

Versus

State of Haryana and another

…Respondents

CORAM: HON'BLE MR. JUSTICE M.M. KUMAR

HON'BLE MR. JUSTICE RAJESH BINDAL

PRESENT: Mr. Arvind Minocha, Advocate, and
Mr. Rajvir Wasu, Advocate

for the petitioners.

JUDGMENT

M.M. KUMAR, J.

The prayer made by the petitioners in this petition filed under Article 226 of the Constitution is to declare paras VIII and XV of Clause 25 of the arbitration agreement, dated 8.11.2002 (Annexure P-2) as illegal and ultra vires. It has further been prayed to quash letter dated 18.8.2006 (Annexure P-8), issued by the Arbitrator-cum-Superintending Engineer, respondent No. 2, to the petitioner calling

upon it to deposit 10% of the amount of the claim submitted by him as per Clause VIII of the contract agreement before entering into arbitration.

Brief facts of the case are that the petitioner, which is a registered company owned by the Government of India, is engaged, inter alia, in execution of construction projects of national importance. It has its registered office at New Delhi. The instant petition is filed through the General Manager (Law) Mrs. Meera Shankar, who has Power of Attorney in her favour (Annexure P-1). The State of Punjab, respondent no.1, issued tenders for the erection, testing, commissioning, starting, stabilization and operation, monitoring and performance of 152 MLD STP based on USAB Technology at Balloke Zone C Ludhiana under Satluj Action Plan. The tender submitted by the petitioner was accepted and the work was awarded to it, which was valued at Rs. 2832.85 lakhs. Accordingly, agreement dated 8.11.2002 (Annexure P-2) was executed between the parties which stipulated a period of 18 months for completion of the work. It has been alleged that the petitioner started the work but on account of breaches and defaults on the part of the respondents it was prevented from timely execution. As a result, the petitioner could complete the work to the extent of Rs. 1345 lakhs only upto 31.3.2005. It had left the work incomplete on 1.4.2005. It has further been alleged that the respondent vide letter dated 2.8.2005 (Annexure P-3), illegally and arbitrarily terminated the contract. The petitioner submitted final bill on 27.9.2005. He had also lodged a claim amounting to Rs. 721.34 lakhs (Annexure P-4),

which is claimed to be in accordance with the provisions of the contract. The Executive Engineer, however, declined the prayer of the petitioner as is evident from the letter dated 10.1.2006, by holding that the such claims are not as per the provisions of the agreement and were barred by limitation (Annexure P-5). The petitioner sent his reply to the afore mentioned rejection on 20.1.2006 (Annexure P-5A).

The petitioner eventually lodged a claim before the Arbitrator-cum-Superintending Engineer, respondent No. 2 on 7.3.2006. However, the Arbitrator-cum-Superintending Engineer, respondent No. 2, on 18.8.2006 called upon the petitioner to deposit the amount of 10% in pursuance to Clause 25 sub-clauses VIII and XV of the agreement so as to enable him to proceed further in the matter (P-8). It was claimed by the petitioner that the requirement of 'deposit at call' amount at the rate of 10% of the claimed amount, as provided by Clause 25 sub-clauses VIII and XV, were void and requested the Arbitrator to adjudicate upon the said claim without insisting on the requirement of 'deposit at call' amount at the rate of 10% (P-6). A reminder was sent on 7.6.2006 (P-7). The aforementioned clauses have now been challenged in this petition. It is appropriate to extract the aforementioned clauses, which reads as under:-

> "VIII. It shall be an essential term of this contract that in order to avoid frivolous claims the party invoking arbitration shall specify the dispute based on facts and calculations stating the amount claimed under each claim and shall furnish a "deposit-at-call" for

ten percent of the amount claimed, on a schedule bank in the name of the Arbitrator, by his official designation who shall keep the amount in deposit till the announcement of the award. In the event of an award in favour of the claimant, the deposit shall be refunded to him in proportion to the amount awarded w.r.t the amount claimed and the balance, if any, shall be forfeited and paid to the other party."

"XV. If the matter is not referred to Arbitrator within the period prescribed above, all the rights and claims of either party under the contract shall be deemed to have been forfeited and absolutely barred by time for arbitration and even for civil litigation."

Mr. Arvind Minocha, learned counsel for the petitioners has argued that the aforementioned clauses are confiscatory in nature and in fact take away the right of arbitration. He has further submitted that both the clauses are arbitrary and violative of Article 14 of the Constitution apart from infringing the provisions of Section 28 of the Contract Act, 1872. Learned counsel has maintained that a writ arising out of a contract executed by an instrumentality or an agency of the State would be competent as has been held by Hon'ble the Supreme Court in the case of **ABL International Ltd. v. Export Credit Guarantee Corporation of India Ltd., JT 2003(10) SC 300**.

We have given thoughtful consideration to the

submissions made by the learned counsel and are of the view that the instant petition is liable to be dismissed. The concept of un-conscionable clauses in a contract would arise only in specified circumstances. In a standard form contract where the bargaining power of the parties is unequal to an extent that one party is virtually left without any freedom to contract then the Courts have come to the rescue of the weaker party. There is elaborate discussion in respect of those clauses including a large number of English cases in a judgment of Hon'ble the Supreme Court in the case of **Central Inland Water Transport Corporation Limited v. Brojo Nath Ganguly, AIR 1986 SC 1571**. A reference has been made to the speech of Lord Diplock in the case of **A. Schroeder Music Publishing Co. Ltd. v. Macaulay (Formerly Instone) (1974) 1WLR 1308** and distinction has been recognized between the standard form contracts between the parties enjoying fairly matching bargaining powers and those who are not enjoying such a freedom. In the concluding part of para 85 it has been observed as under:-

> "Lord Diplock then proceeded to point out that there are two kinds of standard forms of contracts. The first is of contracts which contain standard clauses which "have been settled over the years by negotiation by representatives of the commercial interests involved and have been widely adopted because experience has shown that they facilitate the conduct of trade". He then proceeded to state, "If fairness or reasonableness were

relevant to their enforceability the fact that they are widely used by parties whose bargaining power is fairly matched would raise a strong presumption that their terms are fair and reasonable". Referring to the other kind of standard form of contract Lord Diplock said (at page 1316): (emphasis added)

"The same presumption, however, does not apply to the other kind of standard form of contract. This is of comparatively modern origin. It is the result of the concentration of particular kinds of business in relatively few hands. The ticket cases in the 19th century provide what are probably the first examples. The terms of this kind of standard form of contract have not been the subject of negotiation between the parties to it, or approved by any organization representing the interests of the weaker party. They have been dictated by that party whose bargaining power, either exercised alone or in conjunction with others providing similar goods or services, enables him to say : 'If you want these goods or services at all, these are the only terms on which they are obtainable. Take it or leave it'. To be in a position to adopt this attitude towards a party desirous of entering into a contract to obtain goods or services provides a classic instance of superior bargaining power." (Emphasis supplied)"

Reference has also been made to the Legislation enacted

in U.K. known as 'Unfair Contract Terms Act, 1977, which was subject matter of discussion in **Photo Production Ltd. v. Securicor Transport Ltd., (1980) AC 827**. The speech of Lord Diplock again has been quoted and the same reads as under:-

> "Since the obligations implied by law in a commercial contract are those which, by judicial consensus over the years or by Parliament in passing a statute, have been regarded as obligations which a reasonable businessman would realize that he was accepting when he entered into a contract of a particular kind, the court's view of the reasonableness of any departure from the implied obligations which would be involved in construing the express words of an exclusion clause in one sense that they are capable of bearing rather than another, is a relevant consideration in deciding what meaning the words were intended by the parties to bear." (Emphasis supplied)"

The aforementioned view as extracted by Hon'ble the Supreme Court shows that the concept of reasonableness and fairness of a clause in a contract could be examined in cases where the bargaining power of the parties is unequal to the extent that the liberty given to one of the party is liberty of a 'Lamb before the Lion'. However, in the present case no such un-equal bargaining power of the parties to the contract is discernible which may warrant examination of sub-clauses VIII and XV of Clause 25 of the Contract. Therefore, we do not find any substance in the argument raised by the

learned counsel for the petitioner and we cannot be invited to examine the validity of the aforementioned impugned clauses on the ground of unconscionable-ness, unfairness or unreasonableness, which are in fact necessary attributes of Article 14 of the Constitution. The aforementioned view is supported by the judgment of Hon'ble the Supreme Court in the case of **L.I.C. of India v. Consumer Education & Research Centre, (1995) 5 SCC 482**. After citing various judgments from England and Legislative provisions in U.S.A., their Lordships' have observed in para 47 as under:-

> "47. It is, therefore, the settled law that if a contract or a clause in a contract is found unreasonable or unfair or irrational, one must look to the relative bargaining power of the contracting parties. In dotted line contracts there would be no occasion for a weaker party to bargain or to assume to have equal bargaining power. He has either to accept or leave the services or goods in terms of the dotted line contract. His option would be either to accept the unreasonable or unfair terms or forego the service for ever. With a view to have the services of the goods, the party enters into a contract with unreasonable or unfair terms contained therein and he would be left with no option but to sign the contract."

We are further of the view that the impugned clauses requiring the petitioner to deposit 10% of the amount claimed has a

laudable object, namely, that no one should file frivolous claims before the Arbitrator-cum-Superintending Engineer, respondent No. 2. Furthermore the impugned clauses do not lack mutuality as any one of the parties invoking arbitration is required to comply with the condition of depositing 10% of the amount claimed. Therefore, there is mutuality in the impugned clauses. In any case, it cannot be concluded that the impugned clauses are irrational, unreasonable or unconscionable.

The argument of the learned counsel with regard to the judgment of Hon'ble the Supreme Court in the case of ABL International Limited (supra), does not advance his case as the writ petition undisputedly is maintainable against the respondent, which is an agency and instrumentality of a State within the ambit of Article 12 of the Constitution. It appears to be well settled that for enforcement of contract against an instrumentality or an agency of the State, the aggrieved party can invoke the extra ordinary jurisdiction of this Court under Article 226 of the Constitution. Having said that it does not lead to conclusion that in every case the jurisdiction are required to be exercised and present is the case where impugned clauses have not been found to be unfair or unconscionable.

For the reasons aforementioned, this petition fails and the same is dismissed.

(M.M. KUMAR)
JUDGE

(RAJESH BINDAL)
JUDGE

January 9, 2007

okg/Pkapoor

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